



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

November 18, 2003

Ms. Carol Longoria
Office of the General Counsel
University of Texas System
201 West Seventh Street
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OR2003-8267

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 191212.

The University of Texas (the "university") received a request for numerous categories of information relating to "the investigation, adjudication and punishment of unauthorized or illegal break-ins or hacking into [the university's] networks, network components and databases . . . from 1997 to the present." The requestor specified that identifying information of students may be omitted from the requested information. The requestor subsequently clarified his request to include only "information involving a successful compromise and actual exploitation." You state that the university will withhold certain responsive information pursuant to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of Title 20 of the United States Code. *See also* Open Records Decision No. 634 (1995) (educational agency or institution may withhold from public disclosure information that is protected by FERPA and excepted from required public disclosure by sections 552.026 and 552.101 without necessity of requesting attorney general decision as to those exceptions).

You inform us that a portion of the requested information was the subject of two previous rulings from this office. In Open Records Letter Nos. 2003-3662 (2003) and 2003-0888 (2003), we concluded that the university could withhold some of the submitted information under section 552.108 of the Government Code. We understand you to assert that the four

criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, and therefore, we conclude that the university may rely on our rulings in Open Records Letter Nos. 2003-3662 (2003) and 2003-0888 (2003) with regard to that information.¹ See Gov't Code § 552.301(f); Open Records Decision No. 673 (2001).

You claim that the submitted information is excepted from disclosure under sections 552.101, 552.108, 552.130, 552.136, and 552.139 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information, some of which consists of representative sample information.³

We first note that the submitted information in Tab 5 includes arrest warrant affidavits. The 78th Legislature recently amended article 15.26 of the Code of Criminal Procedure to add language providing:

The arrest warrant, and any affidavit presented to the magistrate in support of the issuance of the warrant, *is public information*, and beginning immediately when the warrant is executed the magistrate's clerk shall make a copy of the warrant and the affidavit available for public inspection in the clerk's office during normal business hours. A person may request the clerk to provide copies of the warrant and affidavit on payment of the cost of providing the copies.

Act of May 31, 2003, 78th Leg., R.S., ch. 390, § 1, Tex. Sess. Laws Serv. 1631 (to be codified as amendment to Crim. Proc. Code art. 15.26) (emphasis added). Thus, article 15.26 of the Code of Criminal Procedure makes an arrest warrant and an arrest warrant affidavit public. As a general rule, the exceptions found in chapter 552 of the

¹The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. See Open Records Decision No. 673 (2001).

²Although you also raise section 552.136 of the Government Code concerning information related to security issues for computers, the 78th Legislature recently renumbered that provision as section 552.139. See Act of May 21, 2003, 78th Leg., R.S., H.B. 3506, § 2(76) (to be codified at Gov't Code § 552.139).

³We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Government Code do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the arrest warrant affidavits that we have marked must be released to the requestor.

We also note that the submitted information includes a complaint. Article 15.04 of the Code of Criminal Procedure provides that “[t]he *affidavit* made before the magistrate or district or county attorney is called a ‘complaint’ if it charges the commission of an offense.” (Emphasis added.) Case law indicates that a complaint can support the issuance of an arrest warrant. *See Janecka v. State*, 739 S.W.2d 813, 822-23 (Tex. Crim. App. 1987); *Villegas v. State*, 791 S.W.2d 226, 235 (Tex. App.—Corpus Christi 1990, pet. ref’d); *Borsari v. State*, 919 S.W.2d 913, 918 (Tex. App.—Houston [14 Dist.] 1996, pet. ref’d) (discussing well-established principle that complaint in support of arrest warrant need not contain same particularity required of indictment). Although the complaint at issue here was made before the magistrate, we are unable to determine whether it was presented to support the issuance of this warrant. Because we are unable to determine whether or not the complaint was presented to the magistrate in support of the warrant, we must rule in the alternative. If this complaint was in fact “presented to the magistrate in support of the issuance of the warrant,” it is made public by article 15.26 and must be released. If the complaint was not so presented, it is not made public by this statute and must be disposed of in accordance with the rest of this ruling.

Furthermore, the submitted information contains a search warrant affidavit, which is made public by statute if the search warrant has been executed. *See* Code Crim. Proc art. 18.01(b). Therefore, the university must release the search warrant affidavit that we have marked.

We next note that the submitted information in Tab 5 consists of information that is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information that you submitted to us for review in Tab 5 consists of completed reports or investigations, which fall into one of the categories of information made expressly public by section 552.022. *See* Gov’t Code § 552.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Since you argue that this information is excepted from disclosure under section 552.108, we will address your arguments.

Section 552.108(a) of the Government Code provides in pertinent part:

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

(1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

...

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution is excepted from [required public disclosure] if:

(1) release of the internal record or notation would interfere with law enforcement or prosecution; [or]

(2) the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication [.]

...

(c) This section does not except from [required public disclosure] information that is basic information about an arrested person, an arrest, or a crime.

Gov't Code § 552.108(a)(1)-(2), (b)(1)-(2), (c). Generally, a governmental body claiming section 552.108(a)(1) or (b)(1) must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). On the other hand, a governmental body claiming section 552.108(a)(2) or (b)(2) must demonstrate that the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See* Gov't Code §§ 552.108(a)(2), (b)(2), .301(e)(1)(A).

You state that some of the responsive records relate to pending criminal cases. You have provided this office with a letter from the chief of the university's police department, stating that his agency is involved in the investigation and prosecution of particular criminal incidents and objects to the release of information relating to those incidents. Based upon these representations, we conclude that the release of the information that we have marked would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th

Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, we conclude that section 552.108(a)(1) is applicable to these reports.

You state that some of the submitted records pertain to criminal investigations that were "exceptionally cleared" because the university's police department deferred the cases to be handled administratively by the university, and that they are considered closed. Furthermore, you inform us that three of the reports were "changed to Incident Reports." We thus understand you to represent to this office that the investigation and prosecution of those matters have concluded in a final result other than conviction or deferred adjudication. Based upon your representations and our review of the submitted information, we find that the information that we have marked pertains to closed criminal investigations that did not result in conviction or deferred adjudication. Therefore, we conclude that section 552.108(a)(2) is applicable to this information. However, you inform us that report number O-00207914 resulted in deferred adjudication; thus section 552.108(a)(2) and (b)(2) are inapplicable to this report.

We note, however, that basic information normally found on the front page of an offense report is generally considered public. *See generally* Gov't Code § 552.108(c); *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the types of information that are considered to be basic front page offense report information, even if this information is not actually located on the front page of an offense report. Although section 552.108 authorizes you to withhold from disclosure the remaining information that we have marked, you may choose to release all or part of the information at issue that is not otherwise confidential by law. *See* Gov't Code § 552.007.

We further note that several of the submitted reports that you claim relate to pending cases pertain to the investigation of an offense for which the statute of limitations has expired. *See* Code Crim. P. Ann. art. 12.01(6), 12.02. You do not inform us that any of these cases were the subject of a pending prosecution on the date that the instant request for information was received by the university. Thus, you have not explained how or why the release of this information would interfere with the detection, investigation, or prosecution of crime. *See* Gov't Code § 552.108(a)(1); *Houston Chronicle*, 531 S.W.2d at 186-87; Open Records Decision No. 434 at 3 (law enforcement agency must explain how release of particular records or parts thereof will interfere with law enforcement or prosecution). Likewise, we find that the university has failed to show that the release of this information would interfere with law enforcement or crime prevention. *See City of Fort Worth v. Cornyn*, 86 S.W.3d 320, 327 (Tex. App.--Austin 2002, no pet.) (delineating types of information protected by section 552.108(a)(1), (b)(1); Gov't Code § 552.108(b)(1); Open Records Decision No. 508 at 4 (1988) (governmental body must demonstrate how release of particular information at issue would interfere with law enforcement efforts). Therefore, the university may not

withhold report numbers O-008192, O-006978, O-0995917, or O-992310 under section 552.108(a)(1) or (b)(1).

You argue that section 552.130 of the Government Code is applicable to some of the submitted information. Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. We have marked the information in the submitted documents that the university must withhold pursuant to section 552.130.

We note that section 552.117 of the Government Code may also be applicable to a portion of the information otherwise marked for release in Tab 5. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1).⁴ Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the university may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. For those employees who timely elected to keep their personal information confidential, the university must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members. The university may not withhold this information under section 552.117(a)(1) for those employees who did not make a timely election to keep the information confidential.

Even when a timely election has not been made, employee social security numbers may be excepted from disclosure pursuant to section 552.101 in conjunction with 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I).⁵ These amendments make confidential social security numbers and related records that are obtained and maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution the

⁴In Senate Bill 1388, which became effective on June 20, 2003, the Seventy-eighth Legislature recently amended section 552.117 of the Government Code by adding "(a)" to the relevant language of this provision. *See* Act of May 30, 2003, 78th Leg., R.S., ch. 947, 2003 Tex. Sess. Law Serv. 2822 (Vernon) (to be codified as an amendment to Gov't Code sec. 552.117).

⁵Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

university, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, before releasing a social security number, the university should ensure that it was not obtained and is not maintained pursuant to any provision of law enacted on or after October 1, 1990.

You next claim that records represented by the information you have submitted at Tab 7 are excepted from disclosure pursuant to section 552.139 of the Government Code. This section provides:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139.

To support your assertion that the type of information represented by Tab 7 is protected under this exception, you have provided a memorandum from the university's Project Coordinator for Information Technology Services ("ITS"). ITS informs this office that the information submitted at Tab 7 relates to representative incidents involving compromises of the university network handled by the Information Security Office. You state that release of this information "would disclose the design, operation[,] and defense of the [u]niversity's information technology resources . . . [and would] reveal security vulnerabilities." Based on these representations and our review of the information submitted at Tab 7, we agree that such records constitute "assessment[s] of the extent to which data processing operations, a computer program, network, system, or software of a governmental body . . . is vulnerable to unauthorized access or harm." We therefore conclude that this type of information must be withheld under section 552.139.

In summary, arrest warrant affidavits and complaints presented to the magistrate must be released subject to article 15.26 of the Code of Criminal Procedure. The search warrant affidavit must be released pursuant to article 18.01(b) of the Code of Criminal Procedure.

With the exception of basic information, the university may withhold the marked information in Tab 5 under section 552.108. We have marked the information in the submitted documents that the university must withhold pursuant to section 552.130. For those employees who timely elected to keep their personal information confidential, the university must withhold the employees' home addresses and telephone numbers, social security numbers, and any information that reveals whether these employees have family members under section 552.117(a)(1). Social security numbers not excepted under section 552.117 may be confidential under federal law. The information in Tab 7 must be withheld under section 552.139. The remaining submitted information must be released to the requestor.⁶

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

⁶As our ruling is dispositive, we do not address your remaining claim.

body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 191212

Enc. Submitted documents

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